JUN 7 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1195

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY COMPANY OF NEW YORK,

Petitioners,

—*vs.*—

THE UNITED STATES OF AMERICA to the use of BALTIMORE BRICK COMPANY.

No. 1196

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY COMPANY OF NEW YORK,

Petitioners,

—*vs.*—

JACOB FRIEDMAN, trading as J. FRIEDMAN COMPANY.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRITS OF CERTIORARI

EMANUEL HARRIS,
Counsel for Petitioners.

Aswel-Law Brief Press, Inc.

INDEX

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1195

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY COMPANY OF NEW YORK,

Petitioners,

—*vs.*—

THE UNITED STATES OF AMERICA to the use of BALTIMORE BRICK COMPANY.

No. 1196

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY COMPANY OF NEW YORK,

Petitioners,

—*vs.*—

JACOB FRIEDMAN, trading as J. FRIEDMAN COMPANY.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRITS OF CERTIORARI

The Facts as to the Rejection of the Brick by the Government.

Respondent Brick Company states in its brief that petitioners' contention that the Circuit Court of Appeals

erroneously construed the provisions of the Miller Act so as to make them applicable to a material man where material was rejected and not used in the prosecution of Government work is based on a misreading of the record (page 2). It is also stated that all of the brick was actually used in the project, although not in outside work (page 3). Said respondent does not dispute that the brick was furnished for exterior use and that the Government rejected it for such use, and that such rejection gave rise to the counterclaim against the Brick Company for the failure to deliver brick according to the A. S. T. M. specifications.

The facts as to the rejection by the Government are disclosed by the record. On January 12, 1944, the Government advised petitioner Johnson that samples of the brick were approved to be according to plans and specifications under date of December 8th, that a number of these bricks in stock piles had badly deteriorated and fallen apart due to frost and that Johnson was proceeding with the brick work at its own risk (R. 236). On the same day, Johnson communicated this information to respondent Friedman (R. 237).

On January 22, 1944, the Government project engineer wrote Johnson as follows:

> "Subject: Defective brick now being used on project.
> "Re: Projects Md-18261-2-3-4.
>
> "Gentlemen:
>
> "In connection with the above reference subject, this is to advise you that the brick which were approved by this office, subject to plans and specifications requirements do not comply with the test of the A. S. T. M. Specifications, C-62-41T, Grade MW.
>
> "A recent report of the Bureau of Standards indicates that 25% of these bricks did not meet the crushing strength test.
>
> "The same is hereby condemned."

On January 24, 1944, Johnson wrote Friedman as follows:

> "We enclose herewith a copy of a letter from the project engineer on the above projects condemning the brick you have been using.
>
> "You will note that in our letter of the 12th we cautioned you to look into this situation.
>
> "It is your responsibility to bear all of the expense of any work that might be required to be replaced.
>
> "You are to take immediate steps to procure brick for these projects that meet all specification requirements."

Friedman forwarded copies of the above letters to the Brick Company and advised the Brick Company that its brick had been rejected and that he would hold the Brick Company for any damage (R. 64-67).

Thereafter and on January 28, 1944, the Government project engineer wrote Johnson as follows:

> "Subject: Use of M-type brick.
>
> "Attention Mr. Shaw.
>
> "Gentlemen:
>
> "Confirming our verbal understanding on the above subject, please be advised as follows:
>
> "This brick can be used for backing up or interior masonry where it is not exposed to the weather or below grade on foundation. Where such a condition exists, the new approved brick should be used on this work."

On February 8, 1944 the Government wrote a "clarification" letter in which it stated that the brick could be used for backing up or interior masonry where it was not exposed to the weather (R. 188).

On September 14, 1944, respondent Friedman wrote Johnson, enclosing a copy of letter from the Brick Company dated August 1, 1944, stating that the Brick Company did not intend to abide by the results of the Government's decision and "*will attempt to enforce collection from us for the rejected brick*" (R. 193-194).

Not all of the brick was used on the interior work as claimed by respondent Brick Company in its brief. In fact, part of Friedman's counterclaim was for the cost of removing and rebuilding brick work because of rejected brick (R. 196). Respondent Friedman admits in his brief (page 6) that some of the brick was actually removed (R. 197). There was no allowance in the judgment awarded to the Brick Company for the brick removed and not used on the project.

The point made by petitioner that the judgment allowed a recovery under the Miller Act for material not used in the project is therefore not met by a showing that *most* of the brick was used on the interior, especially since the brick was actually furnished for use on the exterior and was rejected by the Government for such use.

In Any Event, Respondent Friedman Was Bound by the Government Rejection of the Brick for Exterior Use, So That No Recovery Should Have Been Allowed for Furnishing Grade H Brick Substituted for the Rejected Grade M Brick.

In order to avoid the effect of his agreement in the subcontract to be bound by all rulings of the Government to the same degree as Johnson and to assume all the obligations of Johnson insofar as Friedman's work was concerned, Friedman relies in his brief (page 8) upon the findings of fact *by the Courts* that the bricks were not defective.

It is shown in the brief of petitioner (pages 20-26) that the Courts below were without authority to review the deci-

sion of the Government that the brick was defective, since by the standard specifications in the Government contract all questions as to the acceptability and fitness of materials were to be decided by the contracting officer, and by the standard provisions of the Government contract, all of which were assumed by Friedman, the decision of the contracting officer on all disputes concerning questions of fact were final, subject only to appeal to the head of the department.

The cases cited in respondent Friedman's brief to the effect that this Court will not disturb concurrent findings of fact by the Circuit Court of Appeals and the District Court do not apply to the situation at bar, since in none of those cases was the question involved as to the authority of the Courts to review the decision of a Government representative.

Virginia Railway v. *Federation*, 300 U. S. 515, was a labor union case involving the application of the Railway Labor Act with respect to findings of fact by the Courts as to labor disputes.

Mahnich v. *Southern Steamship Co.*, 321 U. S. 96, was a personal injury case in admiralty involving findings by the Courts as to the seaworthiness of a vessel.

Goodyear Co. v. *Ray-O-Vac Co.*, 321 U. S. 275, was a patent infringement suit involving findings by the Courts as to the infringement.

Anderson v. *Abbott*, 321 U. S. 349, was an action for an assessment against stockholders of a bank, involving findings by the Courts as to the bona fides of the organization of a holding company.

Respondent Friedman further attempts in his brief (page 9) to avoid the effect of the Government decision on the ground that such decision is not conclusive if based upon a change or misinterpretation of the contract. Not only is this an incorrect statement of the rule of law involved,

since such decision may be attacked only by a showing of fraud, or of mistake or negligence so great as to justify an inference of bad faith, but there is no evidence in the record of a change or misinterpretation of the contract. The A. S. T. M. specification called for brick having a minimum compressive strength of 2200 pounds per square inch (R. 49). The brick furnished by the Brick Company was below the allowable minimum (R. 58, 237). There was therefore neither a change nor a misinterpretation of the contract involved. The cases cited by respondent Friedman on this point do not support the contention that the decision of the Government representative under the contract provisions here involved may be set aside if based on a change or misinterpretation of the contract.

In *Dock Contractor Co.* v. *City of New York*, 296 Fed. 377, the contract provided that the engineer was *not* permitted to interpret or construe the contract, and the contract did *not* give the engineer power to determine the necessity for underpinning buildings. The Court therefore properly held that the engineer's decision as to the necessity for underpinning was not final. In our case the contractor clearly provided that the Government representative should determine the fitness and acceptability of materials and that the parties would be bound by such determination.

In *Helvetia Milk Condensing Co.* v. *United States*, 56 Fed. (2d) 676, the contract did *not* provide that the calculation of profit made by the Federal Trade Commission would be final and conclusive and the Court therefore properly held that plaintiff was not bound by such determination. Moreover, the Court in that case held, as contended by petitioner here, that where the decision of an officer is made final by the contract, it may be impeached only for fraud or mistakes so gross as necessarily to imply bad faith or failure to exercise an honest judgment.

In *Tomlinson* v. *Ashland County*, 170 Misc. 58, where an architect was *not* given the right to construe the contractual

rights or liabilities of the parties, and he was merely given the power to decide the meaning of the plans and specifications, the Court properly held that the interpretation by the architect as to the right of plaintiff to charge for certain items of extra work was beyond the architect's jurisdiction. There is no dispute in our case as to the jurisdiction of the Government representative to decide questions as to the fitness and acceptability of material.

Respondent Friedman also argues (page 9) that the finality of the Government's decision depends upon the Government's performance and cannot be based upon a breach of contract. It is not clear just what is meant by this statement. Presumably, the reference is to the rejection of the brick "on the basis of a test conducted in violation of contract" as stated in respondent Friedman's brief (page 9). This relates to the A. S. T. M. specification requiring the selection of brick for testing by a person appointed by the purchaser at a place to be designated when the purchase order is placed (R. 52).

It has been shown in petitioner's brief that Friedman alone was the purchaser and gave the purchase order (R. 14). Hence, Friedman alone was guilty of any breach of contract arising from the failure to designate the place of selection of brick for testing when the purchase order was placed.

Respondent Friedman states in his brief (page 7) that the mode and method of conducting the test of the brick were specified and that the use of some other method cannot be relied upon to establish a breach of contract. Since Friedman alone was responsible for the test to be made from brick selected by a person and at a place designated in the purchase order for the brick which only Friedman gave, and of which neither Johnson nor the Government had any knowledge, Friedman cannot now complain that when the brick was tested by the Government during construc-

tion, in accordance with its right to make such test, the brick was found to be defective.

The cases cited by the respondent on this contention have no application whatever to the situation here, and, indeed, do not even bear on the point made by respondent.

Continental etc. Bank v. *Carey Bros. Cont. Co.*, 208 Fed. 976, involved the construction of a dam. The Court found that the engineer approved a deviation from the prescribed method of construction and that the contractor was not responsible for a subjacent condition. There was no question involved in that case of a form of test different from the form provided by the contract.

In *Economy Fuse & Mfg. Co.* v. *Raymond Concrete Pile Co.*, 111 Fed (2d) 875, it was held that the specification of length and maximum resistance of piles for foundations did not relieve the contractor of the obligation to perform his work in a workmanlike manner so as to accomplish the result for which the work was intended. Again, there was nothing in that case even bearing on respondent's contention.

The Isaac Newton, Federal Cases No. 7089, was an admiralty case in which it was held that an action brought by the builders of a steam engine for a boat was not premature by reason of the fact that the builders were required to test and prove their work, which test was prevented because the owners of the boat took possession thereof and commenced the running before the test was made. There was no question in that case of a difference in form of test as against the form provided by contract.

Respondent Friedman contends that he was entitled to rely on the plans and specifications and not to assume the risk of a test on samples taken without notice under conditions which "may have altered very materially the condition of brick" (page 7). It has already been shown that Friedman alone was in a position to have the brick tested by a person and at a place designated in the purchase order. He

failed to have the brick so tested although he undertook by his contract with Johnson (Article V, R. 211) to subject materials to tests *whenever required*, and he therefore deliberately assumed the risk of a test made by the Government during the construction in accordance with its absolute right to do so. Moreover, Friedman himself was responsible for any alteration in the condition of the brick which may have taken place, since under the provision of Article V of his contract with Johnson (R. 214), he agreed to cover, protect and exercise due diligence to secure his work from injury.

In this connection, respondent Friedman cites the case of *Christie* v. *United States*, 237 U. S. 234 (page 7), which has no application whatever to this case. In that case where there was a deceptive representation in specifications as to material to be excavated, it was held that where time did not permit borings to be made by the contractor to verify the representation, the contractor was permitted to recover extra costs resulting from such misrepresentation. There is no question in this case as to any misrepresentation in the specifications.

Respondent Friedman makes no attempt in his brief to answer petitioner's contentions, that in any event, the Government had the right to test materials and reject defective materials at any time during construction, and require its correction, and that inspection and acceptance of materials at the place of manufacture was not final in the case of departures from the specifications, and that in any event, Friedman was bound under the standard form of guaranty for a year after final acceptance to remove defective materials.

Respondent Friedman attempts to avoid the usual provision in the subcontract that Johnson should not be liable for a greater sum for additional work than Johnson obtained from the Government and that recovery by Friedman for

extra work was conditioned upon a recovery by Johnson from the Government, on the ground that "extra work or work outside the contract" was not involved (Respondent Friedman's brief, page 7).

The record discloses that Friedman's claim is not only for the additional cost of Grade H brick, not provided by the contract, above the cost of Grade M brick called for by the contract, but that such cost was characterized on the trial by counsel for Friedman as "extra cost of material" and the work of removing and replacing rejected brick work was likewise referred to by Friedman's counsel as "extra cost of removing and rebuilding brickwork because of rejected brick" (R. 196, 197-198). It is clear that extra work and work outside the contract was involved and that the recovery allowed to Friedman was contrary to the subcontract provisions whereby Friedman agreed that such recovery should not be had unless Johnson first recovered from the Government.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioners.